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No. 80-1997

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

INTERNATIONAL ASSOCIATION OF FISH & WILDLIFE AGENCIES,
Petitioner,

v.

DEFENDERS OF WILDLIFE, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY MEMORANDUM FOR PETITIONER

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REPLY MEMORANDUM FOR PETITIONER

The arguments advanced in the memorandum for the federal respondents and the brief for respondent reinforce our contention that this case involves important questions regarding the role of the judiciary and the executive in implementing treaties which are not self-executing. Those questions, and the other issues raised by the petition, merit this Court's review.

1. The federal respondents state that the citizen suit section of the Endangered Species Act "provides the sole basis of jurisdiction in the present case" but ignore the critical question, which is whether Congress has incorporated the Convention on International Trade in Endangered Species ("CITES") into the Endangered Species Act so as to make that treaty judicially enforceable against the executive branch pursuant to the citizen suit provision. That provision authorizes any person to bring a civil action "to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of this chapter [the Endangered Species Act]." 16 U.S.C. §1540(g)(1)(A). This language, of course, authorizes a civil

action, such as that brought by Defenders of Wildlife, against the Scientific and Management Authorities established under CITES only if those authorities have violated requirements imposed on them by the Endangered Species Act. That Act, however, imposes no such requirements.

Section 8(e) of the Act, as in effect when this case arose and was decided by the District Court, merely stated that the Management and Scientific Authorities "shall thereafter be *authorized* to do all things assigned to them under the Convention, including the issuance of permits and certificates." 16 U.S.C. §1537(e) (emphasis supplied). Congress thus refrained from incorporating CITES into the Endangered Species Act or enacting any requirement that the Management and Scientific Authorities comply with CITES. Congress chose instead only to provide the executive branch the authority necessary to carry out that Convention. Accordingly, the Endangered Species Act, as existing at the time this case was brought and decided, imposed no requirement that the executive branch comply with CITES. Allegations of violations of CITES do not constitute the allegations of violations of the Endangered Species Act necessary to support an action under the citizen suit provision. The federal respondent's reliance on the citizen suit provision is misplaced because Congress did not incorporate CITES into the Endangered Species Act or any other domestic law.

To hold that Congress incorporated all of CITES into domestic law merely by giving the executive branch authority to carry out CITES would be to invite excessive entanglement of the judiciary in the executive's implementation of international obligations. Such a rule would make the executive's decisions under treaties subject to judicial review and supervision when Congress intended only to authorize the executive to carry out those treaties and contemplated no role for the courts. Because of the great potential for difficulty and embarrassment created when the executive's interpretations and implementations of our international obligations are subject to review by the courts (see, *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936)), Congress should be held to have in-

corporated a treaty which is not self-executing into domestic law and thereby to have made its implementation subject to judicial review only when Congress has expressed a clear intention to require that result. Under this test, Congress has not made the relevant provisions of CITES part of domestic law and, accordingly, they may not be enforced against the executive in federal court.

2. The brief for respondent tacitly acknowledges the difficulties which would be created by subjecting the executive branch's decisions under CITES to judicial supervision. In discussing the situation in which the judicial and executive interpretations of CITES differ, respondent suggests that the consequences of the judicial interpretation would be "entirely domestic" and that the 'executive branch will remain free to take any position it wishes in international negotiations." Brief for respondent, p. 9. The equanimity with which respondent views this situation is unjustified. First, decisions affecting international trade and the manner in which the United States carries out its international obligations can never be "entirely domestic" matters. Second, the executive will hardly be able effectively to advocate an interpretation of CITES in international negotiations if the United States implements a different interpretation pursuant to judicial order. To prevent this anomalous situation from developing, the judiciary should play a role in treaty implementation only when Congress clearly and unequivocally indicates it should do so. Congress has given no such indication with respect to CITES.

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for writ of certiorari should be granted.[1]

Respectfully submitted,

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[1] Petitioner has limited this reply memorandum to those among the points raised by respondents which warrant reply. The limited scope of this memorandum should not be construed as abandonment of any of the arguments made in the petition.